

# AL-MAJALLA AL AHKAM AL ADALIYYAH (The Ottoman Courts Manual (Hanafi))

## BOOK V. PLEDGES.

### INTRODUCTION.

#### TERMS OF ISLAMIC JURISPRUDENCE RELATING TO PLEDGES.

- 701. A pledge consists of setting aside property from which it is possible to obtain payment or satisfaction of some claim. Such property is then said to be pledged, or given in pledge.
- 702. The act of accepting property as a pledge is called taking on pledge.
- 703. The person who gives his property as security is called the pledgor.
- 704. The person who accepts property as security is called the pledgee.
- 705. The person with whom the pledgor and the pledgee deposit the pledge on trust is called the bailee.

### CHAPTER I. MATTERS RELATING TO THE CONTRACT OF PLEDGE.

#### SECTION I. FUNDAMENTAL BASIS OF THE CONTRACT OF PLEDGE.

- 706. A contract of pledge is concluded by the offer and acceptance of the pledgor and the pledgee. If the pledge is not transferred to the effective possession of the pledgee, however, such contract is incomplete and revocable. The pledgor may, therefore, denounce such contract before delivery of the pledge.
- 707. In a contract of pledge, offer and acceptance is made by words purporting to imply agreement, as where the pledgor states that he has given such and such property as for his debt to the pledgee, or similar words to that effect, and here the pledgee states that he has accepted such pledge or has assented thereto, or words indicating consent. It is not an essential condition that the word pledge should be mentioned. *Example.* A person having purchased an article for so much, hands the vendor certain of his property, telling him to keep it until the price is paid. Such property is then validly given in pledge.

#### SECTION II. CONDITIONS INCIDENTAL TO A CONTRACT OF PLEDGE.

- 708. The pledgor and pledgee must be of sound mind. They need not have reached the age of puberty. Consequently, a minor of perfect understanding may be either pledgor or pledgee.
- 709. The subject matter of the pledge must be something which may be validly sold. Consequently, it must be in existence at the time of the contract, must have some specific value, and also be capable of delivery.
- 710. The property in respect of which the pledge is given must be capable of sustaining a claim in respect to such pledge. Consequently, a pledge may be taken in respect to property wrongfully appropriated. But a pledge taken in respect to property held on trust is invalid.

#### SECTION III. MATTERS ATTACHED TO THE PLEDGE: CHANGE AND INCREASE.

- 711. Things which are implicitly included in sale are also included in pledge. Thus, when a piece of land is pledged, all trees growing thereon, together with the fruits thereof and all plants and growing crops are included therein even though not explicitly mentioned.
- 712. A pledge may be exchanged for another pledge.  
*Example:-* A person who has pledged his watch for so many piastres may ask pledgee to take a sword instead of the watch and if the pledgee returns the watch and accepts the sword, such sword thereupon becomes the pledge for the debt in question.
- 713. The subject matter of the pledge may be increased by the pledgor after the conclusion of the contract. That is to say, a second piece of property may be added to the first after the contract relating thereto has been concluded, the first pledge remaining intact. The additional pledge is added to the pledge of the original contract, as though the original contract had been concluded with reference to the two pledges, both becoming one pledge for the debt as it stood at the time the pledge was increased.
- 714. The debt secured by the pledge may be validly increased in respect to the same pledge. *Example:-* A person pledges a watch worth two thousand piastres to secure a debt of one thousand piastres. If such person contracts a further loan from the creditor of five hundred piastres, the watch becomes a pledge for one thousand five hundred piastres.
- 715. Any increase arising out of the pledge is part of the original pledge.

### CHAPTER II. PLEDGOR AND PLEDGEE.

- 716. The pledgee may of his own accord cancel the contract of pledge.
- 717. The pledgor may not cancel the contract of pledge without the consent of the pledgee.
- 718. The pledgor and pledgee may cancel the contract of pledge by agreement. The pledgee, however, may retain the pledge after the cancellation of the contract, until the sum secured by such pledge has been paid.
- 719. A principal debtor may validly give a pledge to his guarantor.
- 720. A pledge may be validly taken from a debtor by two creditors, whether such creditors are partners or not, such pledge securing both debts.
- 721. A creditor may validly take a pledge in respect to sums due from two persons, such pledge securing both debts.

### CHAPTER III. THE PLEDGE.

#### SECTION I. PRESERVATION OF THE PLEDGE AND EXPENSES CONNECTED THEREWITH.

- 722. The pledgee may keep the pledge himself or may have it kept by some person in whom he has confidence, such as members of his family, or a partner, or a servant.
- 723. The pledgee is responsible for expenses incurred in connection with the preservation of the pledge, such as rent of the premises and wages of the watchman.
- 724. If the pledge consists of an animal, the cost of forage and the wages of the keeper must be paid by the pledgor. If the pledge consists of movable property, all expenses incurred in connection with the improvement and maintenance thereof, such as repairs, irrigation, grafting, weeding, and the cleansing of watercourses must be borne by the pledgor.
- 725. Should either the pledgor or the pledgee of their own accord defray expenses which should rightly be met by the other, such payment is in the nature of a gift, with regard to which no subsequent claim may be made.

#### SECTION II. PLEDGE OF BORROWED ARTICLES.

- 726. A person may make a valid pledge of property borrowed from some third person, provided he has received the permission of that person. This is known as a pledge of a borrowed article.
- 727. Should the owner of property give permission unconditionally, the borrower may pledge such property in any way whatsoever.
- 728. Should the owner of such property have given permission subject to a condition as to the amount of money, or the nature of the property to be secured, or that the pledge is to be made to a certain person, or in a certain town, the borrower must strictly observe such condition.

## **CHAPTER IV. FUNDAMENTAL RULES RELATING TO A PLEDGE.**

### **SECTION I. GENERAL.**

- 729. It is a fundamental rule that the pledgee has the right of retaining possession of the pledge until the redemption thereof. In the event of the death of the pledgor, the pledgee has a prior right over other creditors and may obtain payment of the debt from the pledge.
- 730. The pledge does not extinguish the right to claim the debt. The pledgee after taking possession of the pledge preserves intact his right to demand payment from the pledgor.
- 731. Upon part payment of the debt there is no necessity to return a portion of the pledge equivalent to such part payment, the pledgee having a right to retain the entire pledge until the whole debt is repaid. When two things have been pledged, however, each one in respect to a specified portion of the debt, and the sum relating to one such specified portion has been repaid, the pledgor may claim the return of such thing only.
- 732. The owner of borrowed property which has been pledged may call upon the pledgor to redeem the pledge and return it to him. Should the borrower of such property be unable to repay his debt by reason of lack of funds, the person lending such property may himself pay the debt and thus redeem the property pledged.
- 733. In the event of the death of either the pledgor or the pledgee, the pledge remains intact.
- 734. Upon the death of the pledgor, his heirs of age stand in his stead. They must redeem the pledge by payment of the debt from the estate of the deceased person. If the heirs are minors, however, or if, being of age, they are absent, that is to say, they are elsewhere in the course of a long journey, the guardian of such heirs may sell the pledge subject to the permission of the pledgee, and repay the debt from the sum realised.
- 735. The lender of property which has been given as security for a debt may not claim such property from the pledgee until the debt in respect to which it has been given as security has been repaid, and this whether the pledgor or the borrowed property be alive or has died before the redemption of the pledge.
- 736. In the event of the death in a state of bankruptcy of a person who has pledged borrowed property, such borrowed property continues as a pledge in the possession of the pledgee and cannot be sold without the consent of the lender. Should the lender of the pledge seek to repay the debt by means of the sale of the pledge, such pledge shall be sold independently of the consent of the pledgee, provided the value thereof is sufficient to meet the debt, however, such pledge may not be sold without the consent of the pledgee.
- 737. In the event of the death of the lender of a pledge and of his debts being greater than his estate, the pledgor shall be called upon personally to pay his debt and to redeem the pledge which he has borrowed. Should he be unable to do so, however, by reason of lack of means, the borrowed property continues as a pledge in the possession of the pledgee. The heirs of the lender of the pledge may redeem such pledge by repaying the debt. In the event of the creditors of the lender of the pledge claiming the sale of such pledge, the pledge, if the value thereof is sufficient to repay the debt, shall be sold regardless of the consent of the pledgee. If it is insufficient to repay the debt, such pledge may be sold with the consent of the pledgee.
- 738. Upon the death of the pledgee, the pledge devolves upon his heirs.
- 739. Should a pledgor give a pledge in respect to debts due to two persons, and repay the debt of one of them, such pledgor may not demand the return of half of the pledge, having no right to redeem the pledge until he has repaid in full the debt due to both creditors.
- 740. A person taking a pledge from two debtors may retain such pledge until the debt of both has been paid in full.
- 741. In the event of a pledgor destroying or damaging the pledge, he must make good such destruction or damage. Should a pledgee destroy or damage the pledge, a sum corresponding to the amount of such destruction or damage shall be deducted from the debt.
- 742. In the event of a third person destroying the pledge, such person shall make good the value thereof as on the day it was destroyed. The sum in question shall be held as a pledge by the pledgee.

### **SECTION II. RIGHTS OF PLEDGOR AND PLEDGEE OVER THE PLEDGE.**

- 743. A pledge by either pledgor or pledgee of the original pledge to some third person is null and void, unless the permission of either the pledgor or pledgee has been obtained.
- 744. In the event of a pledge of the original pledge being made by the pledgor to some third person with the permission of the pledgee, the second pledge stands in the place of the first pledge, which becomes null and void.
- 745. In the event of a pledge of the original pledge being made by the pledgee, with the permission of the pledgor, the first pledge becomes null and void, and the second pledge is valid, being in the nature of a pledge made of a borrowed object.
- 746. In the event of the pledgee selling the pledge without the permission of the pledgor, the pledgor may either adopt or cancel such sale.
- 747. In the event of the pledgor selling the pledge without the permission of the pledgee, such sale is invalid and the pledgee may retain possession of the pledge. If the debt is repaid, however, such sale is valid. Moreover, if the pledgee adopts such sale it is valid, the sale acting as a release of the pledge, the debt being unaffected. The price realised by the sale becomes the pledge of the thing sold. Should the pledgee not agree, however, the purchaser may either wait until the pledge has been redeemed, or apply to the Court for an order cancelling the sale.
- 748. Provided permission is mutually given, both the pledgor and the pledgee may lend the pledge to a third person. Either of them may afterwards restore it to a state of pledge.
- 749. The pledgee may lend the pledge to the pledgor. If he does so and the pledgor dies, the pledgee has a right of preference over other creditors of the pledgor in respect to the pledge.
- 750. The pledgee may not make use of the pledge without the permission of the pledgor. The pledgee, however, may use the pledge with the permission of the pledgor and may take the produce thereof, such as fruit and milk. In such case there is no reduction of the debt is consideration thereof.
- 751. The pledgee, upon removing to another place may take the pledge with him, provided the road is safe.

### **SECTION III. DEPOSIT OF THE PLEDGE WITH A BAILEE.**

- 752. Possession by a bailee is equivalent to possession by the pledgee. That is to say, should the pledgor and pledgee agree to deposit the pledge with some person in whom they have confidence, and such person agrees to take possession thereof, the pledge becomes irrevocable. The bailee then stands in the place of the pledgee.
- 753. In cases where at the time of the conclusion of the contract it has been agreed that the pledgee shall take possession of the pledge, the pledgor and the pledgee may buy mutual consent deposit the pledge with a bailee.
- 754. The bailee may not give the pledge to either the pledgor or the pledgee during the continuance of the debt without the consent of the other. Should he do so, the return thereof may be demanded. Should the pledge be destroyed before it is returned, the bailee must make good the value thereof.
- 755. In the event of the death of the bailee, the pledge may, subject to the consent of the two contracting parties, be deposited with some other bailee, and in the event of their failing to agree, the pledge shall be deposited with a bailee appointed by the Court.

#### **SECTION IV. SALE OF THE PLEDGE.**

- 756. Neither the pledgor nor the pledgee may sell the pledge without the consent of the other.
- 757. Should the pledgor refuse to make payment when the debt falls due, he shall be directed by the Court to sell the pledge and pay the debt. Should he still persist in his refusal, the pledge shall be sold by the Court and the debt repaid.
- 758. Should the pledgor be absent and should it be uncertain whether he is alive or dead, the pledgee may apply to the Court for an order for the sale of the pledge and the satisfaction of the debt from the proceeds.
- 759. If there is good ground for believing that the pledge is likely to deteriorate, the pledgee may apply to the Court for an order directing him to sell the pledge and he thereupon holds the proceeds of the sale as the pledge. Should the pledgee sell the pledge without having obtained an order from the Court, he becomes responsible therefor. Thus, if there is good ground for believing that the ripe fruit and vegetables of an orchard and garden which may have been pledged are likely to perish, they may be sold by order of the Court. Should the pledgee, however, sell them on his own initiative, he is liable to make good any loss which may be incurred thereby.
- 760. The pledgor may validly appoint the pledgee or the bailee, or some third person his agent for the sale of the pledge when the debt falls due for payment. Thereafter revoke the power of such agent, nor can he be removed in the event of the death of either the pledgor or the pledgee.
- 761. An agent for all sale of a pledge shall, when the debt falls due for payment, sell such such pledge and hand the proceeds to the pledgee. Should he refuse to do so, the pledgor shall be forced to sell the pledge himself. In the event of the pledgor likewise refusing to sell, such pledge shall be sold by the Court. Should either the pledgor or his heirs be absent, the agent shall be obliged to sell the pledge. Should he refuse to do so, such pledge shall be sold by the Court.

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